Prior Agreements for Disposition of Frozen Embryos

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The practice of freezing embryos[1] created by in vitro fertilization (IVF) of human eggs has led to the storage of thousands of embryos in laboratories, clinics, and hospitals across the country. While decisions to thaw or continue storage of these embryos have usually been unproblematic, disputes concerning frozen embryos have aroused national attention and shown the need for clear rules for determining who "owns" or controls those embryos.[2] This Article discusses the enforceability of a couple's prior agreement as a device for regulating the disposition of frozen embryos.

I. THE INEVITABILITY OF EXTRA EMBRYOS

In vitro fertilization as a treatment for infertility involves the surgical removal of eggs from the ovaries and their extracorporeal fertilization before placement in the uterus. Rather than rely on capturing the one egg naturally produced during a monthly cycle, the practice of IVF depends on hormonal stimulation of the ovaries to produce multiple eggs. Retrieval of ten or more eggs during a single cycle is now common.

The routine retrieval of multiple eggs presents IVF programs and couples with a dilemma. If all eggs are inseminated, more embryos will result than can safely be placed in the uterus.[3] Many IVF programs and couples, however, are committed to placing all viable preembryos in the uterus. Rather than discard extra embryos, physicians generally will not inseminate more eggs than the couple would be willing to have placed in the uterus (usually three to five embryos), discarding extra, noninseminated eggs.[4] If the inseminated eggs did not fertilize or cleave, the couple could be left with fewer than the optimal number of embryos for transfer to the wife's uterus.

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1. To conform to popular usage, the term "embryo" rather than the technically more accurate term "preembryo" is used throughout this Article. As used here, "embryo" refers to all preimplantation stages of development after fertilization up until implantation in the uterus and the development of the embryonic axis. Shortly after implantation, when pregnancy begins, the pre-embryo becomes clearly established as an embryo. *See* Jones & Schrader, *And Just What Is a Pre-Embryo?*, 52 FERTILITY & STERILITY 189 (1989).

2. In the summer of 1989, two cases involving disposition of frozen embryos raised national attention. In Davis v. Davis, 1989 Tenn. App. LEXIS 641, a divorcing couple fought over what should happen to their seven frozen embryos. In York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), a couple wished to remove a frozen embryo from Norfolk to Los Angeles, against the wishes of the IVF program. In both cases there was not a clear prior directive for disposition of the embryos in question. For a more detailed account of these cases and their disposition, see Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 465, 489-91, 502-03, 510-11 (1990).

3. Fertilization occurs in over 90% of cases in which eggs are inseminated. To avoid the risk to offspring and mother of multifetal pregnancy, three or four embryos is the maximum number that can safely be placed in the uterus.

4. The couple will have to decide before insemination how many to fertilize because all fertilized eggs will be placed in the woman, even if they choose to inseminate more than three to five and all fertilize. There are malpractice risks here for the physicians. *See* Robertson, *supra* note 2, at 525-28.

Cryopreservation or freezing of embryos allows all retrieved eggs to be fertilized because the extra embryos can be preserved for transfer during later cycles. Thus embryo freezing should help increase the chances of pregnancy during any one cycle—it will assure that at least three or four embryos are available for transfer. Also, it will relieve the woman of the physical burden and costs of undergoing ovarian stimulation and egg retrieval during later attempts at IVF pregnancy. Finally, it might enhance the chances of pregnancy in later cycles since thawed embryos will be placed in the woman during a natural cycle, free of the stimulating drugs and surgical intrusion.[5]

These advantages have led many IVF programs in the United States and abroad to offer embryo freezing as an option to patients undergoing IVF. A 1988 survey of IVF in the United States from the National IVF-ET registry reported that 67 centers performed 1025 frozen embryo replacement cycles in attempts to achieve pregnancy, with 13 centers each performing more than 25 replacement cycles.[6] A 1987 survey of cryopreservation practices found that 63 percent of the programs reporting offered embryo freezing, with another 33 percent of programs planning to offer freezing by 1990.[7]

II. Dispositional Questions: The Locus and Scope of Authority

The growing practice of embryo freezing will result in an increasing number of embryos stored in clinics, laboratories, and embryo banks across the country.[8] While many of the stored embryos will be thawed and placed in the woman within a few months or a year, many will be kept for longer periods. Who has authority to dispose of these embryos? What dispositions are they free

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5. *See* Trounson, *Preservation of Human Eggs and Embryos*, 46 Fertility & Sterility 1 (1986).

6. Medical Research International & The Society for Assisted Reproductive Technology, The American Fertility Society, *In Vitro Fertilization-Embryo Transfer in the United States: 1988 Results from the IVF-ET Registry*, 53 Fertility & Sterility 13, 18 (1990).

7. Medical Research International & The Society for Assisted Reproductive Technology, The American Fertility Society, *In Vitro Fertilization/Embryo Transfer in the United States: 1987 Results from the National IVF-ET Registry*, 51 Fertility & Sterility 13, 17 (1989) [hereinafter *1987 Registry Results*]; Fugger, *Clinical Status of Human Embryo Cryopreservation in the United States of America*, 52 Fertility & Sterility 986, 989 (1989).

Pregnancy rates with frozen embryos vary with the stage of development at which the freezing occurs and the program's overall experience with embryo freezing. The most efficient method (least number of embryos transferred per pregnancy) involves transferring embryos frozen at the pronucleate zygote stage of development. *Id.* The three most experienced programs in the United States have frozen, thawed, and transferred 40-50% of all preimplantation embryos reported in a recent survey. *Id.* They also account for 62% of all clinical pregnancies and 79% of all births reported. However, of the centers providing data, 55% have had at least one pregnancy and 75% of the centers reporting one or more pregnancy have had at least one birth. *Id.*

8. While embryo freezing is to a great extent still experimental, and much work remains to be done to make it successful, many couples undergoing IVF will want to freeze extra embryos. *See* Fugger, *supra* note 7; 1987 *Registry Results*, *supra* note 7. The primary reasons listed by centers for patients selecting cryopreservation options were the opportunity for additional transfer cycles and pregnancy, reduced risk of multiple gestation, and reduced cost. Patients who rejected the freezing option had religious, moral, or ethical objections; fears that cryopreservation might affect the fetus; concerns about the additional expense for cryopreservation; or concerns about the expected decreased pregnancy rate in the retrieval cycle. *See* Fugger, *supra* note 7, at 987.

As a result of these factors, several thousand embryos now exist in storage, with the number increasing daily as more programs enter into freezing and more couples choose this option. The Fugger study reported 4403 embryos in storage of 6934 that had been cryopreserved, a number which is constantly changing. *Id.* at 988 (Table 1).

to make? Should limits be placed on what is done with embryos? These questions now deserve careful attention. They will become more complicated as couples divorce, die, move away, lose interest, or otherwise become unavailable to make their wishes known.

Clear rules for disposition of embryos is necessary to meet the needs of infertile couples, to minimize disputes, and to facilitate efficient IVF program operation. As I have shown elsewhere, devising such rules require coming to terms with fundamental issues of embryo status, the procreative liberty of infertile couples, and institutional prerogatives in operating IVF programs.[9] Although there is little explicit law on disposition of frozen embryos, several points or principles about embryos and their disposition are gaining consensus.

For example, it is now widely accepted that the gamete providers are the locus of dispositional authority over frozen embryos.[10] While important questions remain about whether they have exercised that authority—for example, may they transfer it to another or exercise it by advance prior directive—no one seems to dispute that they are the primary decisionmakers.

There is also a wide consensus, though it is more contested and even limited by law in a few states, that embryos have no rights or interests in themselves. Although deserving of special respect, they are not persons, and thus are owed no duties as such.[11] Discard or failure to place embryos in a uterus is therefore ethically and legally acceptable. Of course, individuals and institutions are free to take a different view of embryo status in their own actions.

Thus the couple providing the gametes have joint authority to have embryos created by IVF and to decide whether they will be placed in the woman's uterus or frozen for later use. If embryos are frozen, they decide whether embryos are thawed and transferred to the uterus of the egg provider, thawed for donation to infertile women, thawed and not transferred (or discarded), or donated for research. Individual states may develop laws that restrict some of these options.[12] Also, individual IVF programs might limit some choices as a requirement for participation in their IVF and embryo freezing programs.

III. The Role of Prior Directives in Disposition of Frozen Embryos

Recognizing the couple's broad dispositional authority over embryos, however, is only a start to devising rules for disposition of frozen embryos. As a joint authority, the couple's decisional authority must be jointly exercised. But the couple may not always be available for joint decisions, for example, if death occurs or if the program loses contact with them. Or the couple may not be able to agree, as might occur with divorce or separation.

To deal with the inability or unavailability of the couple to agree jointly on disposition, many IVF programs ask couples who undertake embryo freezing to designate in advance their choices for disposition of frozen embryos in the event

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9. Robertson, *supra* note 2, at 480-82.

10. *Id.* at 484-87.

11. *Id.* at 472-78.

12. For example, a state ban on embryo discard might be constitutional. *Id.* at 527-30. Louisiana, Minnesota, and possibly Missouri presently have laws banning embryo discard. *Id.* at 527.

that specified future situations occur, such as death, divorce, passage of time, failure to pay storage fees, unavailability, or disagreement.

A recent survey of embryo cryopreservation in the United States, for example, found that twenty-three of the twenty-seven programs that reported offering embryo freezing required the patient to designate the method of disposition of frozen embryos in case of parental death or divorce.[13] Of the centers that required a disposition document, twenty-one centers included the option to donate the frozen embryo to another couple, six included an option to use the embryos for research, and twelve included an option to discard the embryos. Assuming that these directives will control the disposition of stored embryos once the stated contingency occurs, no doubt most programs will offer couples the chance to give such directions.[14]

If programs do not offer the advance directive option to couples, they will, as part of the informed consent process, inform them of dispositions which the program will make with embryos when specified events occur. In the event of divorce, for example, some programs may decree that the wife gets the embryos; that the embryos will be discarded; that the program gets custody for donation, research, or eventual discard; that all embryos will be donated anonymously; or that the courts will decide.[15] Or in the case of the death of one or both partners, the program might state that all remaining embryos will be discarded or donated anonymously to infertile couples. These directions are as much prior directives as agreements between the couple. They are agreements between the couple and the program for disposition when certain events occur, and are also assumed to be legally binding.

IV. Will Prior Directives Be Legally Enforced?

Agreements between couples and agreements with programs for future disposition of embryos are assumed to be legally binding, but their legality has yet to be tested or challenged. The practice, accordingly, carries some legal uncertainty, and may make programs hesitant to rely on such agreements in disposing of stored embryos if one or both gamete providers object.

Uncertainty about the legal status or enforceability of these agreements is not surprising given the nascent state of embryo freezing. No state has enacted legislation recognizing the validity of such agreements, nor specified the conditions under which they must be made to be valid. Their validity has been neither upheld nor denied in the courts, if only because direct legal challenges have not yet arisen. For example, neither *Davis v. Davis* nor *York v. Jones*, the

13. Fugger, *supra* note 7, at 987.

14. Such options parallel the popular and widely accepted practice of living wills, for termination of treatment when a person is incompetent and terminally ill. However, it is not clear to what extent IVF programs have relied on those directives to dispose of embryos, particularly if one or both of the parties objects. Also, the options offered often do not cover the range of possibilities which could arise as a result of embryo freezing. *See infra* notes 51-53 and accompanying text.

15. *Embryos Have Their Day in Court*, Hosp. Ethics, Nov./Dec. 1989, at 1, 3.

leading IVF cases to date, involved the legal effect of an advance directive for disposition of embryos.[16]

Moreover, the passage of time between the making of the directive and the contingency calling for its enforcement opens the door to claims of unfairness due to changed circumstance. Such a claim might be made by a couple that directs that all embryos should be transferred or donated if death or divorce occurs, but, for example, dread the thought once divorced of biologic offspring issuing from their failed marriage. A claim of nonenforcement due to changed circumstance is also likely when couples agree in advance to discard all embryos, but one party now sees the frozen embryos as the only possible way to have biologic offspring. In either case, the claim of unfairness due to changed circumstance injects legal uncertainty into the situation.

Finally, legal uncertainty arises from the similarity of advance directives for disposition of embryos to prenatal agreements to relinquish children for adoption and to surrogate mother contracts.[17] As a preconception agreement concerning reproduction, frozen embryo directives might be found unenforceable like other preconception reproductive arrangements.

Until legislation is passed, or there is a clear legal ruling about the validity of prior directives for frozen embryos, doubt will remain as to whether IVF programs may—or indeed, must—routinely dispose of embryos in accordance with prior directives without further approval from the couple. When one or both parties object, should the program follow the agreement or ignore it and reach some other solution? Must courts facing embryo disputes recognize the agreement? These questions must be answered if clear rules for the disposition of frozen embryos are to emerge.

V. A CASE IN POINT: *WENDEL V. WENDEL*

The role of the advance directive in disposition of frozen embryos may be illuminated by considering a dispute currently in the courts. A couple married in 1974 sought IVF treatment for infertility at the Cleveland Clinic in January 1988. Egg retrieval and IVF fertilization led to five preembryos. Three embryos were placed in the woman's uterus, and the remaining two were frozen.[18]

An "Embryo Freezing Agreement" signed by the couple prior to freezing the embryos stated (with Option No. 1 selected):

> We are aware that, for a variety of reasons (for example, our choice; death of one or both of us; or achieving our desired family size), one or more of our embryos may remain frozen and will not be wanted or needed by us. In such a situation, we agree and authorize The Cleveland Clinic Foundation to maintain such unused embryos in a frozen state until the earliest in time of the following . . . events or dates:

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16. In Davis v. Davis, 1989 Tenn. App. LEXIS 641, the person responsible for getting the couple to sign such a directive forgot to do so, so no prior agreement was ever signed. In York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), the issue was whether the couple had in fact agreed to have their embryos thawed and disposed of only in Norfolk. If a consent form clearly limiting their right to remove embryos to other locations had been signed, then the issue of whether advance agreements are binding would have arisen.

17. *See infra* notes 42-48 and accompanying text.

18. Wendel v. Wendel, No. D 191962 (Ohio C.P. Dom. Rel. Ct., Cuyahoga County, filed July 21, 1989).

1) the death of either of us;
2) our legal separation, dissolution, or divorce;
3) whenever we both consent; . . .

After the earliest of such . . . events or dates, we authorize and request that any and all remaining frozen embryos be disposed of by The Cleveland Clinic Foundation in one of the following ways (check one):

(x) *OPTION NO. 1*
That the embryos be disposed of (destroyed) in accordance with Foundation policies . . .

( ) *OPTION NO. 2*
That one or more of our frozen embryos be made available for donation to a suitable anonomous [*sic*] recipient couple.[19]

The husband filed for divorce. In July 1989 the wife petitioned for a restraining order against the Cleveland Clinic destroying the frozen embryos, claiming that they "represent her only chance of having natural children of her own during her lifetime."[20] An order against destruction of the embryos was granted pending the outcome of the divorce action.[21]

In resolving the dispute between the couple over the frozen embryos, what role, if any, should the provisions of the Embryo Freezing Agreement concerning destruction of the embryos in case of separation or divorce (Option No. 1) play?

In determining that role, it must first be clear that embryo discard or destruction is a dispositional option legally available to the parties and the IVF program. If state law prohibits embryo discard or requires that unwanted embryos be donated, then an agreement to discard embryos in the case of divorce would be defeated by that law.[22] Ohio, however, has no law that prohibits embryo discard or recognizes any independent legal standing or interests for extracorporeal embryos. Until legislation or a court decision to that effect, discard appears to be a legally available dispositional option.

A second important question is whether the quoted provisions do in fact constitute an agreement to have embryos discarded in the event of divorce. A close scrutiny of the language raises some doubts as to whether the provision is an agreement to have unused embryos discarded in the case of separation or divorce even if one party objects. For example, the situations listed in the first sentence for when embryos may not be wanted or needed mention death, but not divorce. In the case at hand the embryos are not "wanted or needed" by the husband, but they are very much "wanted or needed" by the wife. Thus it is not accurate to say that the embryos are "not . . . wanted or needed by us," which is the operative situation that empowers the Clinic to discard them in the event of separation or divorce. One might thus reasonably argue that the couple has

19. *Id.* ("Embryo Freezing Agreement" with The Cleveland Clinic Foundation (January 25, 1988)).
20. *Id.*
21. *Id.*
22. Such a law has a good chance of being found constitutional because it does not infringe the right to avoid gestation and pregnancy recognized in Roe v. Wade, 410 U.S. 113 (1973). *See* Robertson, *supra* note 2, at 527-30.

not made an advance agreement to have all embryos discarded in case of divorce if one of the parties later objects.

If this interpretation is accepted, then there is no issue posed of the enforceability of a prior agreement for disposition of frozen embryos. There is simply no such agreement (though there may be an agreement for disposition in other circumstances). In the absence of such an agreement and a state law against discard of embryos, the case should be resolved on the basis of the relative burdens that would be placed on the parties as a result of particular outcomes of the dispute. As I have argued elsewhere, the party who wishes to avoid reproduction should prevail unless the party wishing to reproduce with these embryos has no alternative means of reproduction available.[23]

In this case, in the absence of an agreement, one could argue that the husband should still prevail and be entitled to discard of the two embryos, because the wife could achieve her wishes of having "natural children during her lifetime" by undergoing IVF with a new partner or sperm donor. Unless she has lost the ability to ovulate or has some other major medical contraindication to egg retrieval, destruction of the frozen embryos in question are not "her last and only chance to have natural children during her lifetime," as she asserts.[24]

On the other hand, if she cannot produce more embryos, then a strong argument exists for preserving the embryos for her reproductive use. Her claim will be strongest if she wants the embryos placed in her uterus so that she may gestate and rear offspring, but will be weaker if she merely wishes the embryos donated anonymously to infertile couples.[25] In the former case, however, an order for custody, support, and visitation that gives due respect to the wishes of the husband should also be entered.

In this case, however, it is also plausible to interpret the provisions of the Embryo Freezing Agreement as amounting to an agreement to have embryos discarded in the case of separation or divorce. If that interpretation is accepted, the question of the enforceability of such provisions is then squarely posed. May the Clinic proceed to discard on the basis of such a provision? Should the court granting the divorce dispose of the embryos on the basis of that agreement, as it might do with the disposition of property according to a prenuptial agreement?

The arguments for enforcing the agreement in *Wendel* appear strong. Having agreed to create embryos only if they would also be discarded in the event of divorce, the question is why should the wife now be able to change her mind and impose on the husband a burden for which he did not bargain? If she can produce embryos with a new partner, should she not have to undergo that burden rather than burden her husband with unwanted parenthood? If that conclu-

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23. Robertson, *Resolving Disputes Over Frozen Embryos*, HASTINGS CENTER REP., Nov./Dec. 1989, at 7. Other possible dispositions such as always transfer, always discard, divide equally, or award to the woman are not adequate guides to disposition for reasons discussed in that article. *Id.* at 7, 8.

24. It would appear that the wife could go through IVF again with a new partner or even a sperm donor. The questions would be whether access to IVF was reasonably available and would it be unduly burdensome for her to go through another egg retrieval cycle.

25. If she will not rear, but merely wishes to have biologic offspring somewhere in the world, it is much less clear that her interest in reproducing should prevail over her husband's interest in avoiding reproduction.

sion would be reached in the absence of an agreement, the argument for reaching it is all the stronger if there is a specific agreement to that effect.

But what if there were no other way for the wife to reproduce—if in fact they were her last and only chance to have "natural children," as she asserts?[26] Such a situation might arise if she had become prematurely menopausal since the embryos were frozen, or could not safely undergo egg retrieval. Would that change in circumstance override an explicit agreement to discard in the event of divorce because enforcement would now be unfair or unreasonable?

Yet it is difficult to see why a person should be able to impose reproductive burdens on the husband because her own reproductive possibilities have now changed. Holding her to her agreement is not unfair to her, despite her change in circumstances, unless she did not knowingly or freely make that agreement. Indeed, it would seem unfair to the husband to impose burdens on him that he specifically sought to avoid in consenting to embryo freezing in the first place. If the wife's case is doubtful in this extreme case, it is even weaker when she has alternative means of reproducing.

Reliance on the prior agreement for discard of embryos thus provides a sound and certain resolution to the controversy in *Wendel*, and in other cases that are likely to arise over disposition of frozen embryos. In making the agreement the parties had the opportunity jointly to determine their reproductive futures. Holding them to the agreement recognizes their procreative liberty, gives the couple and the IVF program clear guidance, and also provides courts with an efficient means of resolving such disputes. The issue in such cases should be whether in fact there was a validly made agreement that covers the issue at hand, and not whether such agreements should be enforced despite a party's change of mind or circumstance.

VI. Prior Directives for Frozen Embryos Should Be Enforced

As the examination of *Wendel* shows, courts should enforce prior directives for the disposition of frozen embryos. Prior directives present the best way to maximize the couple's reproductive freedom, to give advance certainty to couples and IVF programs, and to minimize disputes and their costs. Competing concerns do not outweigh these interests, and raise their own problems. The situation with frozen embryos is so different from preconception agreements made by surrogate mothers concerning abortion and child rearing that those precedents should not control. On the other hand, the use of such directives is consistent with the precommitment devices increasingly used to regulate issues in marriage and at the end of life.[27]

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26. If they are her only chance, the question of whether she would gestate and rear the offspring would also be relevant in determining the relative burdens and benefits on the parties. *See infra* note 30.

27. See Elizabeth Scott's imaginative use of precommitment directives to discourage divorce, in Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990).

A. *Prior Directives Maximize Procreative Choice*

A main reason for enforcing prior directives for frozen embryos is that it maximizes the gamete providers' procreative liberty by giving them control over future disposition of embryos produced in the course of IVF treatment of infertility.

Gamete providers have joint authority over embryos precisely because of their reproductive significance. The disposition of embryos created from their gametes will determine whether or not the gamete providers have biologic offspring.

To exercise maximum control over their procreative interests, it is essential that gamete providers have the power to make binding agreements for future disposition of embryos. Without such authority, decisions about embryos will be made by others in ways which might insufficiently value the reproductive concerns of the persons involved. For example, the state or the IVF program may then determine what happens to embryos, rather than the parties themselves. It would seem to be in the interest of the couple to reserve this right by their prior agreement.[28]

The downside, however, is that they can then be held by the other party or program to their agreement, even if they would prefer a different disposition when the stated contingency occurs. But this risk is outweighed by the couple's ability to control future dispositions overall. If they cannot make jointly binding directives—if one party can unilaterally veto the directive at any point in the future—they lose the freedom to impose their preferred choices in the future situation, an important measure of procreative freedom to both parties. Freedom to contract or to make directives binding in future situations enhances liberty even though it involves constraints on what may occur once the future situation comes about.[29]

The importance of this power to bind themselves and others in advance becomes clear when the alternative to such binding power is considered. If the prior agreement is not binding, then the IVF program, a court, or a legislature will determine the disposition of frozen embryos. That decisionmaker might order dispositions different than would the gamete provider, thus interfering more with procreative interests than would holding one to a freely chosen future disposition. The parties are left with less control over their procreative interests

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28. The use of a prior agreement for embryos parallels the use of living wills to determine treatment decisions when a person is unable to decide, and the use of organ donor cards to determine whether a person's organs and tissue will be available for transplant when they die. It would appear to be another way to recognize personal autonomy, for one's current interests and autonomy may be served by the ability to direct future events when the person is unable or unavailable to decide. Of course, prior directives for frozen embryos present a novel situation in that embryo disposition affects two persons. But this fact does not detract from the exercise of personal autonomy that making such agreements involves. *See also supra* note 27.

29. Even living wills have a cost. At the time that they take effect, the person's interests may best be served by ignoring the prior directive. But the advantages of living wills—controlling one's future in advance and giving a clear basis for a nontreatment decision—can be obtained only by accepting this cost. This is the trade-off that exists with all forms of prior directives, even though it has not always been recognized. *See* Dresser & Robertson, *Quality of Life and Nontreatment Decisions: A Critique of the Orthodox Approach*, 17 L. MED. & HEALTH CARE 234 (1989).

than if they have the ability to make advance binding agreements for disposition of embryos.[30]

B. *Administrative Convenience and Efficiency*

A second reason for enforcing the prior dispositional agreement is that it gives the certainty needed for efficient operation of embryo freezing programs. Doctors and institutions setting up programs which may handle thousands of embryos over several years need some certainty about what dispositions are legally available when a variety of events occur.

Advance certainty is especially needed concerning who will make decisions about embryos, and what decisions may or will be made if the decisionmakers are unavailable or unable to agree among themselves. For example, the IVF program needs to know how long it must store embryos; when it may discard embryos; whether it may or must discard, donate, or place in the wife when the husband or wife requests or objects; and what to do in case of death or divorce, long passage of time, loss of contact with the program, failure to pay storage fees, or the program going out of business. Rather than decide these issues on an ad hoc basis, it is in the interest of all parties to know what the dispositional rules will be, in particular whether their own agreements and their acceptance of IVF program conditions will control.[31]

While a legislature could write a detailed code of what should happen in these situations, this is unlikely. It is also undesirable, because it may unduly restrict the procreative choice of the gamete providers. Indeed, unless one assumes that the embryo itself deserves protection, in most cases there is no

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30. If the prior directive does not control, how would decisions about disposition be made? The institution or state might adopt a general policy that will control the outcome. But their choice of policy will depend on their evaluation of the importance of two parent families, the burden of reproduction, the status of embryos, and the like. But since reasonable people might disagree over what the most desirable outcome is in such cases, it maximizes the interests or freedom of the couple to designate what that outcome would be in advance. Would they not prefer to determine the disposition rather than have the state or institution impose it on them?

Alternatively, if the prior directive is not honored, the decisionmaker might decide on a case-by-case basis which party is most deserving or least hurt by a given disposition. This approach would require an evaluation of the relative burden of unwanted reproduction versus the burden of nonreproduction with these embryos, which would depend in turn on other reproductive options available to that party.

A case-by-case analysis, however, is difficult, costly, and prone to error, since so many factors must be considered. Also, it might be skewed against one of the parties. For example, a man would seldom need these embryos to reproduce, because it is relatively easy for him to produce others with a new partner. On the other hand, depending on how one views the burdens on women of undergoing IVF, the agreement to have embryos discarded could always—or never—be overridden by the woman. The couple's interests would seem better served by maintaining control in advance over future outcomes, rather than being subject to the vagaries of case-by-case evaluation by other decisionmakers.

31. Dr. Howard Jones, the director of one of the leading American IVF/embryo freezing clinics, stated the questions to which IVF programs need the most direction: what to do if one or both of the providers die, the providers divorce or separate, they fail to meet storage fees, they fail to report a change of address or otherwise stay in contact with the program, they lose interest, the wife loses the ability to carry the embryo, or one or both of the providers wish to remove embryos from cryopreservation and discard or take them elsewhere. Cryopreservation Problems, Presented by Dr. Howard Jones for Consideration by the Ethics Committee of the American Fertility Society, Washington, D.C., Sept. 22, 1989 (on file with the Ohio State Law Journal). Other questions no doubt will arise as experience grows.

"right" answer in most situations of disposition. The outcome depends on the needs and wishes of the parties involved.[32]

In the absence of a detailed legislative code, either the IVF program or the parties themselves will determine disposition. In some cases the program itself will set the rules, asking the couple to agree to them as a condition of participation. Such limits on the procreative choice of couples (who might prefer different options but cannot easily go elsewhere) serve institutional needs and the personal values of the physicians running the program. More frequently, the program will preserve procreative choice by asking the couple to agree upon disposition in advance.

The latter two solutions to the problem of administrative certainty both require legal assurance that agreements for disposition of embryos—with the program and with each other—are binding. Efficient administration of embryo freezing programs thus requires legal recognition of dispositional agreements. Rather than have to track down parties, negotiate a new agreement, or await the outcome of court battles, the program can simply follow freely accepted program guidelines or the couple's freely chosen dispositional directives. This certainty will also enable the program to inform the couple in advance of future dispositional consequences, so that they can make more informed decisions about whether they wish to embark upon freezing in that program or at all.[33]

Consider the administrative nightmare that would arise if legal recognition of program guidelines and couple choice is not forthcoming. A program would never be able to dispose of embryos—whether by discard, donation, or use—unless both providers agree at that time. If they are not available to agree, or are available but disagree, programs will usually continue to store embryos until there is a legislative or judicial solution. Moreover, the program cannot reliably tell the couple what will happen in those future situations, because it simply will not know. This uncertainty may deter both infertile couples and physicians from engaging in embryo freezing.

Furthermore, there will be doubts about whether the program's own guidelines and conditions will control. The program's power to set restrictions on embryo disposition to serve its own goals will be open to speculation. There will be no certainty that its own conditions on time limits, against interprogram transport, for or against discard, or payment of storage charges will be legally binding on a couple who later objects to them. This may deter some physicians or institutions from starting IVF and embryo freezing programs, thus reducing access to this technology.

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32. For example, is it clear that children would be better off not being born to a woman whose husband had died before embryos were thawed? Is it better that embryos be saved or that children not be born to single parents? Obviously, there is no clear answer to this question.

33. Note that the survey of current freezing practices found that over 20% of couples choose not to freeze for various reasons. *See* Fugger, *supra* note 7, at 987. It may be that a clear exposition of their future options would cause others to think twice before freezing.

C. *Decrease the Incidence of Disputes and the Costs of Dispute Resolution*

A third reason to enforce prior agreements for disposition of embryos is that legal recognition will minimize disputes and the cost of resolving disputes which do arise.

If agreements between gamete providers and between gamete providers and programs for disposition of embryos are legally binding, fewer disputes about embryo disposition will arise. A party is less likely to claim a disposition different from that agreed upon for when the stated contingency occurs. Nor is he likely to challenge actions taken in accordance with program guidelines. While some challenges to whether the agreement process was itself free and informed may occur, there will be many fewer disputes between couples and between couples and IVF programs. Costly litigation, such as that which occurred in *Davis v. Davis*, simply will not arise.[34]

Moreover, the costs and ease of resolving the disputes which do arise will be lessened, to the benefit of the courts and parties. Rather than litigate anew issues of embryo status, and whether the man or woman is hurt more by a given disposition, the dispute will turn on the validity and substance of the agreement. While questions of interpretation and challenges to the agreement process may arise, the overall costs of disputes will be lessened.

In the absence of legal reliability, there will be a greater tendency for parties to litigate, with programs continuing to store embryos until there is a judicial or legislative solution. When disputes arise, courts will have to determine the relative burdens and benefits to the parties of particular dispositions. Unless very experienced in these issues—which trial courts are unlikely to be—these determinations will be difficult, time consuming, and easily prone to error, if only because of the confusions that arise from controversies over embryo status.[35] Surely enforcement of prior agreements for disposition of embryos is less likely to generate litigation and more likely to resolve it efficiently when it does arise.

VII. Objections to Enforcement of Prior Agreements

Objections to enforcing prior agreements between the gamete providers and with the program for disposition of embryos arise from the gap in time between the making of the agreement and when it becomes operative. The gamete providers are asked to give directions for future disposition at a time when those possibilities are highly theoretical or hypothetical. Their needs and interest may change so drastically between the time of making and the time of operation that it might seem unfair to hold them to reproductive decisions made much earlier.

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34. *See* Robertson, *supra* note 2, at 502-11 (discussing Davis v. Davis, 1989 Tenn. App. LEXIS 641). The benefits here parallel the benefits of giving legal effect to living wills or prior directives for termination of treatment for incompetent patients. Enforcing the living will gives a reasonably certain answer concerning what to do in given situations that promotes a competent patient's autonomy and minimizes disputes.

35. In Davis v. Davis, 1989 Tenn. App. LEXIS 641, the trial judge confused basic issues about embryo status to reach his result. He never addressed the burdens on Ms. Davis of having her undergo another cycle of egg retrieval, because of his unsupported view that embryos are "in vitro children." *See* Robertson, *supra* note 2, at 510-11.

Moreover, since preconception agreements for or against abortion or child rearing are not binding, preconception agreements for disposition of embryos should be treated similarly. However, a closer look at these objections shows that they do not outweigh the advantages of enforcing voluntary agreements for disposition of stored embryos.

A. *Foreseeability and Changed Circumstances*

The main argument against enforcing prior agreements for disposition of embryos rests on the inability to foresee how one will feel when the stated contingency occurs and on the possibility of unfairness that could arise when a party's circumstances have changed. This view, for example, has been stated by the Trustees of the American Medical Association:

> In general, these agreements should be enforced. However, the decision to go forward with pre-embryo transfer can have such profound consequences that either gamete provider should be able to show that changed circumstances make enforcement of the agreement unreasonable.[36]

The AMA Trustees, however, give no examples of what such changed circumstances might be or when enforcement might have such profound consequences that it would be unreasonable. Such a claim could arise either when the prior agreement was to discard the embryos and one party now objects, or to use them and one party wishes them discarded.[37]

The situation in which a party who agreed to discard now wishes the embryos to be used is similar to the situation in *Wendel* discussed above. Mere change of mind would not seem to be a sufficient basis for overriding the agreement because the party objecting to enforcement would ordinarily be able to reproduce by creating other embryos. There is no compelling reason why a party who had agreed in advance that embryos should not be used in the event of divorce should be free to impose the burden of unwanted biologic reproduction on another just because she has changed her mind and wishes to use these embryos rather than go to the trouble of creating new ones.[38]

The stronger—but still insufficient—case for overriding an agreement to discard embryos would arise if the embryos now represented the objecting party's last chance to reproduce, as might be the case if that party had become sterile or menopausal since making the agreement, or other factors made reproduction by other means not reasonably feasible. Unless these embryos are placed in the woman, in a surrogate, or donated to another, the objecting party

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36. Report of the Board of Trustees, American Medical Association, Council on Medicolegal Problems, Council on Ethical and Judicial Affairs, Frozen Pre-Embryos, at 8 (1989) (on file with the Ohio State Law Journal).

37. The strongest claim for nonenforcement would be if the wife had specifically agreed to have the embryos implanted in her uterus, but now objects. If she could not be forced to carry to term, even pursuant to a specific agreement to do so, she should not have to permit placement of embryos in her body, even if she would be free to abort any pregnancy which then occurred. *See infra* notes 42-48 and accompanying text.

38. From the perspective of the person seeking embryos for reproduction, all embryos made with his or her gametes should be fungible. If other embryos are reasonably available, there is no clear basis for preferring the ones that already exist.

will never have biologic offspring.[39] Would this change in circumstance make enforcement of the agreement unreasonable since there would be no other way for the sterile person now to have genetic offspring?

It may be that in the absence of an agreement the resolution of competing reproductive interests would favor the party who had no alternative way of reproducing. If the right to reproduce and the right to avoid reproduction are in conflict, favoring reproduction is not unreasonable when there is no alternative way for one party to reproduce.

But the situation is different when the party now objecting to the discard of embryos had explicitly agreed that embryos would be discarded if divorce occurred. This disposition might have been crucial to the other party, so that freezing might not have occurred if there had been the risk of reproducing in the case of divorce. Moreover, recognizing such a change in circumstances would undercut the administrative certainty which enforcement of prior agreements provides. Claims of unfairness due to changed circumstances will be more frequent, with courts having to weigh the competing interests of the parties, rather than merely enforcing their prior agreement.[40]

In the reverse situation, in which the parties agreed in advance that all embryos would be used or donated and one party now objects, it is difficult to see what change in circumstance would justify overriding the agreement to have discard occur. One had bargained for reproduction, even if divorce or death had occurred. There is no readily imaginable circumstance which would make biologic reproduction without more such a burden that the original agreement to have reproduction occur should be overridden.[41]

In sum, advance agreements for disposition of embryos raise few problems of foreseeability or changed circumstances different from those that arise in a vast array of other transactions which are held binding, despite a changed situation that makes the original agreement now undesirable to one of the parties. Indeed, clear rules about legal enforceability should lead to more precise agreements and more extensive bargaining to avoid the worse kinds of results. The risk of unfairness in enforcing embryo agreements does not override the advantages of legal certainty that accrues to couples and IVF programs from enforcing these agreements.

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39. But if the embryos will be donated, then the claim of need to have offspring is less compelling because no rearing will occur. The interest in having genetic offspring *tout court* seems less compelling than the interest in gestating and rearing genetic offspring.

40. In deciding such cases, the court would have to factor in whether the party seeking to save the embryo would be gestating and rearing as well, or whether it would be donated to an infertile couple. The strongest case for overriding the agreement would be if the objecting party would gestate, or gestate and rear. If they would only have a biologic tie, their claim is weaker. Resolving disputes by judgments of this sort places further pressure on dispute resolution machinery.

41. Only if the agreed upon use of embryos would lead to severe financial or psychological burdens would a colorable claim to override the agreement exist. But if the other party wants to stick to the agreement and have reproduction occur, this interest in offspring should control, even if that party would have alternative means of producing offspring. Having agreed in advance to use these embryos to produce offspring, there is no reason why the other party's change of mind would cause such "profound consequences" that the agreement should be overridden.

B. *Surrogate Mother and Other Nonalienability Analogies*

One might argue, however, that changed circumstances should be given greater emphasis when they involve reproductive matters, and attempt to derive support from cases that refuse to enforce preconception agreements concerning abortion, adoption, and surrogate motherhood.

Preconception or prenatal agreements to terminate parental rights and relinquish a child for adoption are generally unenforceable. Indeed, postnatal relinquishment for adoption is not legally effective until a certain statutory waiting period has elapsed. Many persons—though by no means all—have argued that surrogate mother agreements to terminate parental rights should also be unenforceable.[42] The New Jersey Supreme Court in *In re Baby M* held that a preconception agreement for a surrogate mother to relinquish her rearing rights and duties in her child would not be enforced.[43] Similar arguments have been made for the unenforceability of agreements to abort or carry a fetus to term.[44]

This result—so different than most contractual matters—may be explained by the importance of the child rearing relationship and the inability to foresee how one would feel after gestation and childbirth. Childbirth is such a major change in circumstances that one should not reasonably be held to foresee how one arguably would feel about child rearing until after birth has occurred. Having undergone the physical rigors and bonding of pregnancy and childbirth, women may have very different views about child rearing than when they made a preconception agreement to relinquish the child for adoption. Accordingly, they should be free to disavow the relinquishment terms of their prior contract.

This result may also be explained in terms of the nonalienability of one's right to rear one's children because of the importance of that relationship.[45] Rights to rear, relinquish, or carry to term are not rights that can be alienated. Although the holder may choose to waive exercise of the right when the time for a decision arises, he or she cannot alienate exercise of the right in advance. It is simply too important a relationship—too central to one's person—to be alienable prior to birth.[46]

Yet even if the validity of the nonalienability position is accepted, it does not follow that disposition of frozen embryos should also be nonalienable. The precedents against enforcement of preconception agreements for adoption de-

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42. *See* M. FIELD, SURROGATE MOTHERHOOD (1988); Capron & Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, 16 L. MED. & HEALTH CARE 34 (1988).

43. *In re* Baby M, 109 N.J. 396, 421-22, 537 A.2d 1227, 1240 (1988).

44. The trial court judge in that case, *In re* Baby M, 217 N.J. Super 313, 375, 525 A.2d 1128, 1159 (1987), although willing to enforce the contract for adoption and rearing, drew the line at an agreement to abort or to refrain from abortion. However, one could argue that damages should be awarded for violating an agreement not to abort, even if specific performance is not possible.

45. *See* Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1941-49 (1986).

46. One might, of course, disagree with these conclusions, and find, for example, that surrogate mother contracts to relinquish the child at birth are enforceable. The nonalienability position undervalues the gain in reproductive freedom that occurs from making such agreements, the legitimate reliance interest of infertile couples, and the inaccurate assumption that pregnancy renders women incapable of foreseeing their true interests. *See* Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, 16 L. MED. & HEALTH CARE 18 (1988).

pend heavily on the gestational and parturitive experience of women. But neither party will have undergone pregnancy or similar burdens with frozen embryos. They are not being called to perform bodily services, or to give up a product of bodily nuturance, as arises with the surrogate mother case. Thus, there is not the same disposition in advance of something as central to meaning and identity as a child that has been brought to term.[47]

Although both situations involve reproduction, they involve such different aspects of reproduction that they are not comparable. Advance agreements for disposition of frozen embryos involve choices about whether opportunities for reproduction will or will not exist when certain specified future events occur. They are not advance agreements to take on or to avoid pregnancy, nor are they preconception agreements for the rearing of children. Rather, they are agreements concerning whether gametic material fused into an embryo will or will not be used to attempt to initiate pregnancy in a willing party.[48]

C. *The Validity of the Agreement*

A final objection to relying on prior directives for disposition of embryos is that there is no assurance that the agreement was knowingly and freely made. The reproductive future of a person will hinge on a signed form, without any clear assurance that the form was executed in a knowing and informed way. For example, a person might object that they did not realize the full implications of their agreement, when or if they may later become sterile and have no alternative way of reproducing outside of the marriage other than by use of these embryos.[49] If reproductive rights are to be waived or alienated, more protection is needed to assure that the choice is free and knowing.

But this is not an objection to enforcement in general, but only to enforcement in particular cases. It will be open to challenge whether a party truly understood what they were agreeing to in choosing options for future disposition of embryos. Thus careful consent procedures are in the interest of all, and will ordinarily be used. An IVF program has a strong interest in being sure that couples freely and knowingly consent to the risks and benefits of IVF. Since embryo disposition agreements will usually be executed at the same time, they are likely to be as validly made. Moreover, it will be open to legislatures or IVF programs to set precise conditions for executing such agreements to assure that they are freely and knowingly made.

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47. A different issue would arise if the agreement were to have the embryos placed in the woman and brought to term. Precedents against enforcing agreements to abort or carry to term would control. Such an agreement probably would not be enforceable because of the unwanted intrusion on the woman's body.

48. On this analysis prior directives or agreements for disposition of gametes in sperm or egg banks would be enforceable, even though an agreement to provide sperm or eggs would not be. Thus an agreement to have frozen sperm discarded after a set period or after the death of the provider would be enforceable. The widow could not override the agreement if she now wished to bear her dead husband's children. By the same token, the sperm bank could not refuse to provide her the sperm if the terms of deposit had contemplated such use.

49. There is a parallel to living wills, which often do not inform the maker that his future interests may be very different than he can imagine from his current competent perspective. *See* Dresser & Robertson, *supra* note 29.

With regard to program conditions, an objecting couple might argue that they had no real choice because no other IVF program offering less onerous conditions was available to them. They would claim that the contract was a contract of adhesion, because they had no effective alternative, and thus should not be bound by program conditions.

But this claim goes to the substantive merits of whether programs should be able to set conditions which will be binding on the parties. Given that institutions and programs will have legitimate reasons for limiting the couple's choices, such as personal or religious views of embryo status, surely IVF programs have the right to set some conditions under which they offer freezing. Again, as long as the parties are informed and told that other programs may offer less rigorous conditions, the bargaining power of IVF programs should not invalidate all dispositional agreements with IVF programs.[50]

VIII. MAKING PRIOR AGREEMENTS WORKABLE

If prior agreements with the IVF program and between the couple are to fulfill their role in maximizing choice and providing certainty, careful attention must be paid to the process of executing those agreements and to their substantive content.

With so much hinging on the options chosen, programs should take great care to make sure that the couple is fully aware of the consequences of their choices and the alternatives foregone. They should have someone other than the doctor explain the program's consent form, the program's guidelines, the limitations on what may be done with embryos, and the possibility of seeking treatment elsewhere. Of special importance are issues such as discard, donation, choice of recipient, use in research, transport to other programs, and right to withdraw. If the program restricts any of these choices, it should make those restrictions clear to the gamete providers and inform them of other programs which offer different options.[51]

The program should also explain very clearly the impact of the dispositional options that are chosen, which may require that more comprehensive options be offered. For example, a general statement such as "destroy embryos if death occurs" leaves open the question of what to do if death of only one party occurs. May the embryo then be placed in the widow or in a surrogate? How would this option relate to program restrictions on use of embryos with single women and surrogates?[52]

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50. In some instances, however, particular program conditions might be unreasonable, such as a condition that embryos may never be removed to another program. But legislatures, not courts, should make that judgment, when the consent to those conditions is otherwise free and knowing. *See* Robertson, *supra* note 2, at 497-501.

51. If prior directives are to be binding, attention must be given to the conditions and circumstances in which they are made. Special counselling of the couple contemplating options and waiting periods should be offered. The risk that they may feel differently later should also be explored, because they will be bound by the agreement. Also, it would be helpful if key operative terms, such as "unavailability", were specifically defined.

52. If a program does not permit IVF with single women, what will its position be if the husband dies, and the widow now wishes frozen embryos to be thawed and placed in her? If it refuses to comport with its married woman requirement, the widow may have to go elsewhere to have her embryos thawed and placed in her, which

The options in case of divorce also need to be very specific, because there are many possibilities beyond discard. For example, some couples, rather than opt for discard in case of divorce, might request that all embryos be given to the wife, or to the husband, or be divided equally (if that is technically feasible).[53] If a divorced gamete provider has custody of the embryos, will the program thaw and place them in her or in his new partner or in a surrogate? These choices should be explained. If there are limitations, then the person's right to withdraw from the program and take his or her embryos elsewhere should be recognized.

Other issues that need to be addressed are the consequences if the program goes out of business, the couple fails to pay storage charges or to keep the program notified of their address, and the couple's right to withdraw and transport embryos to other programs. To serve the goals of maximizing couple choice and administrative efficiency, all of these issues should be addressed explicitly so that the couple is informed as to the choices they are making.

IX. Conclusion: The Recognition of Commitment

IVF and embryo freezing greatly enhance the procreative choices of infertile couples, offering new options for ordering their reproductive lives. Not surprisingly, respect for the freedom of the couple in making these choices should be recognized. If the goal is to give couples maximum control over their reproductive lives, the couple should be free to freeze embryos and to choose among the range of legally available options for embryo disposition.

To recognize this freedom over their procreative futures, many IVF programs offer couples the option of designating what dispositions should occur if they are not available or able to agree when certain specified events occur. In some cases IVF programs specify the outcome and ask the couple to accept those dispositions as part of their consent to embryo freezing.

Legal recognition of agreements between gamete providers and with IVF programs for future disposition of embryos is desirable. Such agreements should be legally binding within the general principles of contract law. If knowingly and freely made, they should be enforced or upheld despite claims of change of mind or circumstance. Enforcement of embryo disposition agreements will maximize procreative freedom, give certainty to IVF programs and infertile couples, and minimize or facilitate resolution of disputes over embryos.

Parties and programs entering into embryo freezing should act on the assumption that courts will regard these agreements as legally binding. When disputes arise, courts should enforce these directives as other contracts would be enforced. Prior agreements are the best way to reconcile the competing interests at stake, and thus to adapt the emerging technology of embryo freezing to the needs of infertile couples.

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may be very burdensome. If it permits the widow to use the embryos, will it also permit the husband to have them placed in a surrogate or a new mate (If the new mate were herself infertile)?

53. Dividing up frozen embryos may not be feasible if more than one embryo is frozen in the same straw. The practice is to put one to three embryos in one straw, which is then frozen.